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KEEPING THE CONSTITUTION INSIDE THE SCHOOLHOUSE GATE—STUDENTS’ RIGHTS THIRTY YEARS AFTER *TINKER V. DES MOINES* *INDEPENDENT COMMUNITY SCHOOL DISTRICT*

*Nadine Strossen**

TABLE OF CONTENTS

I.	Introduction.....	445
II.	Connections Between Drake Law School and the <i>Tinker</i> Case.....	446
III.	A Plaintiff’s Perspective	447
IV.	An International Perspective.....	450
V.	Students’ Rights Issues	453
	A. An Academic Perspective.....	453
	B. An Activist Perspective	456
VI.	Ignorance of the Law	457
VII.	Defiance of the Law	458
VIII.	How to Not Win Friends but Influence People.....	461
IX.	Increasing Enforcement Challenges in the Post-Columbine Backlash	462
X.	The Role of the Media: Scapegoat or Co-Conspirator?.....	465
XI.	Media Hype.....	466
XII.	Censoring, Versus Censuring, the Media	469
XIII.	Conclusion	472

I. INTRODUCTION

I would like to thank Drake University for hosting this important program. I am happy to be back here, where I have had the honor of speaking on a couple of prior occasions, which have left very positive memories. Most important, in 1993, I was a Distinguished Visiting Scholar at the very Constitutional Law Center that is hosting this symposium.

II. CONNECTIONS BETWEEN DRAKE LAW SCHOOL AND THE *TINKER* CASE

It is so fitting that this conference should take place at Drake Law School, given its many connections to the historic *Tinker* case.¹ Before the armband controversy had become a court case, while it was still being debated before the Des Moines School Board, the lawyer who represented the Iowa Civil Liberties Union and the students was a Drake Law Professor, Craig Sawyer. I recently re-read an account of one of the school board's hearings, and I was especially struck by one exchange between one board member, George Caudill, and Professor Sawyer. Caudill asked Sawyer if he supported a student's right to wear not only a black armband but also an armband with a Nazi swastika. Here is Sawyer's forceful answer: "Yes, . . . and [also] the Jewish Star of David and the Cross of the Catholic Church and an armband saying 'Down with the School Board.'"²

This statement boldly reaffirms a basic free speech principle—the right to express beliefs or ideas that others may not share. I find it so striking because it was, sadly, so predictive of future—and ongoing—student free speech struggles. For example, in the fall of 1999, the ACLU had to come to the defense of a high school student in Mississippi who was suspended for wearing a Star of David pin.³ To him it was a symbol of his Jewish faith, but to the school board, it was a dangerous gang symbol.⁴ Those of us with a Jewish heritage may well be a gang of sorts but not the sort that threatens school safety! I am happy to report that the ACLU won this case.⁵ And, of course, the *Tinker* precedent played a crucial role in that victory.

Now let me turn back to the *Tinker* case and its Drake connections. When the Des Moines School Board refused to rescind its ban on armbands despite the forceful advocacy of Drake Law Professor Craig Sawyer, the Iowa Civil

* Professor of Law, New York Law School; President, American Civil Liberties Union (ACLU). This Article represents the written version of the author's keynote address given October 8, 1999. For research assistance with this Article, the author thanks her Chief Aide, Amy L. Tenney, and her Research Assistant, Mark A. Konkel. The footnotes were added through the efforts of the staff of the *Drake Law Review*, who thereby have earned both the credit and the responsibility for these notes. The author extends a special thanks to Editor in Chief Jennifer C. Brooks and Associate Editor Stacie E. Barhorst for their synergistic blend of professional excellence and personal courtesy.

1. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).
2. PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 236 (1988) (quotations omitted).
3. *Jewish Student Allowed to Wear Star of David Pendant as Mississippi School Board Reverses Policy* (visited Feb. 23, 2000) <<http://www.aclu.org/news/1999/n082499a.html>>.
4. *Id.*
5. *Id.*

Liberties Union (ICLU) was forced to go to court.⁶ From that point on, all the way to the United States Supreme Court, the case was handled by a young volunteer attorney for the ICLU, Dan L. Johnston, who was then a recent graduate of Drake Law School—only twenty-eight-years-old. I hope the law students and young lawyers in the audience tonight will sit up and take note of that fact!

I often try to encourage law students and lawyers to volunteer their time and talents to do pro bono or public interest legal work.⁷ The term *pro bono publico*—"for the good of the public"—is really a misnomer, because the work is also for the good of the lawyer. Certainly the lawyers who do this kind of work for the ACLU get incredible opportunities, even very early in their careers, to handle important and fascinating cases, which always make a tremendous difference in their clients' lives and liberty and may well make a great difference in the law of the land as well. Dan Johnston's leading role in the *Tinker* case is a prime example, but there are many others too.

Now I would like to mention one more Drake connection to the *Tinker* case that is, unfortunately, somewhat less positive. I will recount this by quoting from a published interview of Mary Beth Tinker. She was talking about the kind of committed, conscientious role models her parents had been for her and her siblings. She said:

"My parents really had a lot of employment problems because of their involvement in controversial things. They were both punished for their views Back then, my mother had a masters degree in psychology, and she was teaching at this small Lutheran college She started organizing against the Vietnam War at the college. So she got fired But my mother kept it up. She was removed from four or five colleges, like Drake University [She got] pushed out because she was really mouthy"⁸

Some of us happen to consider being "mouthy" a positive trait, and I am certainly happy it was passed on to the Tinkers' children!

III. A PLAINTIFF'S PERSPECTIVE

I am so proud the ACLU represented the Tinker family members and Christopher Eckhardt in their courageous exercise of their rights—which of course led to the landmark Supreme Court case that upheld the rights of all

6. IRONS, *supra* note 2, at 236.

7. See Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, but Also the Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122 (1993).

8. IRONS, *supra* note 2, at 245 (quoting Mary Beth Tinker).

students and others in the public school context.⁹ Mary Beth Tinker, who was a thirteen-year-old junior high student when the case began, has continued to be active in the ACLU, and I have had the pleasure of meeting her several times. She often speaks to students, encouraging them to stand up for their rights.

I am sorry Mary Beth and Chris Eckhardt are not here with us this weekend themselves. But I am delighted John Tinker is here, along with his mother, and I am honored to meet both of them. Moreover, just as the ACLU spoke for Mary Beth in court during the litigation, I would like to be her spokesperson here now. I am glad Professor John Johnson's Article will focus on another heroic plaintiff in this case, Christopher Eckhardt.

On June 22, 1995 Mary Beth gave a moving talk at the ACLU's Biennial Conference in New York City—when we were celebrating our seventy-fifth anniversary. I received the transcript of that powerful talk from the ACLU's Archives at Princeton University and would like to share a few portions of it with you now. Mary Beth started by noting how unusual it was for her to be addressing adults, given her passion for speaking to young people.¹⁰ In her words:

I really like to talk to kids because they get so excited and interested in the subject of student rights and they can relate immediately to what I am talking about and they always get a lot of hope from [it]. And there is a shortage of hope among our kids today

But my son especially thinks [*Tinker v. Des Moines*] is a pretty cool case, he is 14 [One day in school], he had been throwing an eraser across the class, so he [was sent] into the in-school suspension, and the vice principal was in there [dealing with] the kids, . . . and [my son] said to her, kind of menacingly, ["H]ave you ever heard of *Tinker v. Des Moines*?[""]

Well, that was a good try—we laughed about it later, the principal and I, she had heard about it but apparently [my son] didn't realize one of the [case's] finer points was that [he] couldn't use that to throw erasers at the teacher's head. The sad part about that is lately you can't use *Tinker* to do much of anything, and especially [due to] some of the recent decisions that have come down since then¹¹

I would also like to share with you Mary Beth's moving remarks at our Biennial Conference about her parents. Along with the statement I already read

9. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

10. Mary Beth Tinker, Address at the ACLU Biennial Conference in New York City (June 22, 1995), in TRANSCRIPT OF THE ACLU BIENNIAL CONF. IN N.Y. CITY 4-20 (1995) (transcript available in the ACLU Archives at Princeton University).

11. *Id.* at 5-6.

about Mary Beth's mother being fired from Drake, among other campuses, these remarks underscore a sad fact about so many ACLU clients and cases: how hard it is to stand up for any rights. Even if you win your case in court, you can still lose a lot—not only jobs but also peace and safety. No wonder Mary Beth and her family were celebrated in Peter Iron's inspiring book, *The Courage of Their Convictions*, in which he honors the ordinary—or, actually, not so ordinary—Americans who were brave enough to fight for their rights—and ours—in cases that have become leading legal landmarks.¹²

Here is what Mary Beth told us about her parents:

My parents were religious people They subscribe[d] to a way of thinking about Christianity where you are supposed to put your beliefs into action; kind of a curious phenomenon So they believed in things like brotherhood, peace, . . . the meek shall inherit the Earth, and that got them in about as much trouble as it did Jesus, maybe a little less

. . . .

And so, . . . I had been taught to put my views into action, and this was a religious philosophy that my parents trained me with, . . . that God is working through us, . . . we are here to put into action his word So it was really not hard for me to volunteer when there was a call put out to students to wear black armbands in mourning for the dead in Vietnam

. . . The rest is history. [The case] went to the Supreme Court, thanks to the ACLU, because we could never have afforded or been able to do it without them. And we also probably couldn't have done it without the support of people like yourselves who were there when our lives were threatened, when someone called me on the telephone, and said, ["Y]ou are going to be dead by morning,["] on Christmas Eve, ["Y]our house is going to be firebombed,["] the red paint which was thrown at our house, which was so ridiculous because my parents were far from Communist, they were religious zealots, so I guess, under those terms, Jesus would be a Communist as well.¹³

One of the things I found so fascinating about Mary Beth's presentation was that she compellingly addressed the *Tinker* case from both micro- and macro-perspectives. The former is no surprise of course—who else could better recount the details of the actual litigation other than Mary Beth and the other plaintiffs—along with their ACLU volunteer lawyer, Dan Johnston?

But I was pleasantly surprised to learn that Mary Beth has become quite a scholar not only of students' rights, but even more generally, of the rights of

12. See generally IRONS, *supra* note 2 (writing about stands taken on principle and conscience in 16 separate cases).

13. *Tinker*, *supra* note 10, at 7-9.

children and teenagers—or, more accurately, the lack thereof. She very constructively encouraged all of us to consider students' rights against this broader context; moreover, to make it even broader, she invoked historical and international dimensions as well.

IV. AN INTERNATIONAL PERSPECTIVE

As the symposium's keynote speaker, I think the most useful thing I can do is to draw attention to some of the general themes and issues at stake in the *Tinker* case and its aftermath, so I would like to launch that process by again quoting Mary Beth Tinker herself:

[I]t wasn't until 1874, . . . that children received legal recognition for abuse, and that was only because the American Society for the Prevention of Cruelty to Animals decided that children should be included, . . . there were [already] laws on the books against abusing animals . . .

So this [lack of legal protection for young people] goes on throughout history. The whole thing right now that's going on against—the juvenile justice right now, scapegoating teenagers, and especially black teenagers, is really nothing new. In 1826, in Britain, a magistrate said there was so much juvenile crime that we really should ship the kids off and emigration would be a good solution, and, in fact, they did, they sent kids off . . . Australia was a favorite place to send kids, there were 500,000 kids sent off a year for quite a while. . . . [Likewise, i]n colonial America, the . . . evangelicals said you should beat the will out of children, that was a way of keeping them from being strong-minded, and the slave[children], . . . [W]e all know what happened there.

[But] I don't know if you realize that white children were sold in those years as well. Here is an ad from 1760, "To be sold by Thomas Overend at the drawbridge, two white boys and a Negro lad, all about 14 years old. Also very good lime juice."¹⁴

In contrast with this negative history about children's rights, including in other parts of the world, the international community recently has taken some significant positive steps. Most importantly, the United Nations Convention on the Rights of the Child,¹⁵ which the United Nations General Assembly adopted unanimously in 1989, broke all records as both the most rapidly ratified and the most widely ratified human rights treaty in history.¹⁶ Out of all 193 nation-states

14. *Id.* at 10-11.

15. *Convention on the Rights of the Child* (visited Jan. 25, 2000) <<http://www.unicef.org/crc/fulltext.html>>.

16. *Id.*; *United Nations Convention on the Rights of the Child FAQ Page* (visited Jan.

in the world, only two have not ratified this convention.¹⁷ It recognizes broad rights for minors, including free expression rights and rights in schools, essentially the same robust rights the Supreme Court upheld in *Tinker*.¹⁸ Therefore, with the subsequent erosion of the *Tinker* holdings and our legal system's general devaluation of minors' rights since then, this international treaty could provide a valuable alternative source of protection.

Alas, though, of the two countries in the entire world that have not ratified this convention, one is our very own United States.¹⁹ The only other country that is our companion in this tiny category of non-ratifiers is Somalia.²⁰ And that is only because Somalia does not have an internationally recognized government, so it is literally unable to ratify—an excuse that is not available to the United States!²¹ The United States Government's refusal to ratify this international convention protecting minors' and students' rights in part reflects our country's longstanding general isolationism concerning international law.²² But it also reflects the recent subversion of young people's dignity and rights throughout our domestic political and legal systems.²³

Let me now counter such grim observations with a more lighthearted episode, but one that also underscores the same serious message: the eternal, global struggle to maintain the basic human rights of young people in school and elsewhere. Fittingly, this also involves a students' rights case that the ACLU handled right here in Iowa, just a few years ago, in Ames. Our clients were, just like Mary Beth Tinker, very young women still in junior high school. Because I am a founder of a group called Feminists for Free Expression, I must say that these particular young women were right after my own heart! They were

25, 2000) <<http://www.unicefusa.org/infoactiv/rights.html>>.

17. *Convention on the Rights of the Child*, *supra* note 15.

18. *Id.*

19. *United Nations Convention on the Rights of the Child FAQ Page*, *supra* note 16.

20. *Id.*

21. *United Nations Convention on the Rights of the Child FAQ Page*, *supra* note 16.

22. See e.g., William Coblenz & Jeff Bleich, *We Need a World Criminal Court: But U.S. Opposes Treaty Establishing Rule of World Law*, S.F. CHRON., Nov. 5, 1998, at A29 (reporting on the United States' refusal to support an international court to enforce international criminal law); Colum Lynch, *US Says It Must Have Veto over War Court*, BOSTON GLOBE, June 18, 1998, at A2 (discussing the Clinton Administration's insistence on retaining veto power over cases heard by an international criminal court); Craig Turner, *Clinton Seeks Aid to Change Views on a World Criminal Court Law: President Writes to Italian Premier Asking Help in Persuading Delegates at Rome Talks to Make Concessions*, L.A. TIMES, July 16, 1998, at A6 (discussing President Clinton's letter urging Italian Prime Minister to press other foreign governments to make concessions in establishing the World Criminal Court).

23. See, e.g., Nadine Strossen, *Students' Rights and How They Are Wronged*, 32 U. RICH. L. REV. 457-75 (1998) (discussing recent legal setbacks to the rights of young people).

feminists, and they were therefore concerned about sexist expression, including sexually suggestive sexist expression. But they did not want to censor or punish that expression—rather, just to counter it with their own pro-feminist views.

Specifically, these young ladies were concerned by the fact that some of their male classmates were coming to school wearing “Hooters” T-shirts. As I am sure many of you know, Hooters is a restaurant chain that features waitresses with suggestive outfits, calling attention to certain parts of their anatomy. The T-shirts show an owl—one of the connotations of the word “Hooters”—designed very provocatively with its eyes strategically placed right over the nipples of the person wearing the shirt. To add to the provocation, the restaurant’s slogan, on the back of the T-shirt is, “Hooters: More than a mouthful.”

Putting their creative counter-speech into action, our young female clients came up with quite a provocative T-shirt of their own. On the front, instead of an owl, it showed a rooster with the word “Cocks.”²⁴ On back, the corresponding slogan was, “Nothin’ to crow about!”²⁵ And that is when the principal decided to intervene, to censor the girls’ T-shirt. Thus, as is so often the case, we see censorship of sexually oriented expression being used to suppress expression that is empowering for women—thus, doubly dangerous to both free speech and gender equality.

But the ultimate outcome here was positive. Our young clients adroitly organized public forums in which they discussed the constitutional issues and drew a great deal of media attention.²⁶ One of the girls wrote an article about their case for a major national teen magazine.²⁷ And they successfully negotiated with school officials to preserve both gender equity and free expression. So, these more recent Iowa student clients were certainly worthy successors of Mary Beth Tinker and her co-plaintiffs!

Coincidentally, a recent edition of *The Defender*, the ICLU’s newsletter, reports on yet another case involving students’ rights to express ideas through what they wear.²⁸ Along with the Hooters T-shirt case, this one also came from Ames, Iowa, and also involved a T-shirt that school officials declared off-limits.²⁹ In the spring of 1999, after some Ames High School students founded a gay and lesbian alliance group, some other students made and wore T-shirts with

24. *National ACLU Director Enters Iowa School Dispute*, DEFENDER (Newsletter of the Iowa Civ. Liberties Union, Des Moines, Iowa), July-Aug.-Sept. 1994, at 3.

25. *Id.*

26. *See generally id.* (discussing the students’ speeches at a school assembly).

27. Erin Rollenhagen, *Shirting the Issue*, SEVENTEEN, Oct. 1994, at 122.

28. *ICLU Education and Advocacy Efforts*, DEFENDER (Newsletter of the Iowa Civ. Liberties Union, Des Moines, Iowa), July-Aug.-Sept. 1999, at 1.

29. *Id.*

the slogan, "I'm Straight."³⁰ School officials censored these T-shirts to protect the sensibilities of the gay and lesbian students, but the latter were more offended by the school's censorship than by the T-shirts.³¹ To the credit of the gay/lesbian students, they reproached the administration for censoring expression based on disapproval of its message³²—a fundamental First Amendment precept that school officials should have been teaching the students, rather than vice versa!

V. STUDENTS' RIGHTS ISSUES

A. *An Academic Perspective*

Humor aside, I consider the topic of this weekend's symposium of the utmost gravity and importance. I say that wearing both my hats, as both constitutional scholar and civil liberties activist. As a scholar, I consider issues of the rights of students and others within the public schools to be among the most challenging. That is because they crystallize the most profound questions, and the most troubling tensions, concerning the appropriate relationships between majoritarian power—or, if you prefer, communitarian choices—on the one hand, and individual and minority group rights on the other.

From one perspective, local school boards may well epitomize grassroots democracy in action, reflecting the prevailing preferences of the local community. From another perspective, for our nation's young citizens, school officials may well epitomize what James Madison called the tyranny of the majority.³³ After all, for most of our youthful years, all Americans are forced to spend most of our waking hours in school, and schools are relatively hierarchical, strict institutions in which the freedom of the individual tends to be subordinated to the overall institutional mission. Indeed, for this reason, it has been argued that public schools are inherently inconsistent with individual liberty. One notable libertarian opponent of public schools was John Stuart Mill. He wrote:

A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing

30. *Id.*

31. *Id.*

32. *Id.*

33. *See THE FEDERALIST NO. 10 (James Madison).*

generation, in proportion as it is efficient and successful, it establishes a despotism over the mind³⁴

That public schools are at least potentially repressive, if not inevitably so, has been recognized by the Supreme Court.³⁵ Seeking to counter the schools' repressive tendencies, the Court long has held they must respect the fundamental rights of individual students and teachers, even those who are members of marginalized or unpopular minority groups.³⁶ The *Tinker* decision is to date the high-water mark of the Court's decisions upholding rights in our nation's schools, but the *Tinker* opinion itself cited many prior cases as supporting the fundamental proposition that "state-operated schools may not be enclaves of totalitarianism."³⁷ As the opinion elaborated:

Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect [S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.³⁸

Nowhere in our society do more citizens more regularly come into contact—and thus, inevitably, into *conflict*—with more government officials. We have about 15,000 school districts across the country, each one with multiple board members, administrators, and teachers.³⁹ More than fifty million students attend our public schools, which number about 90,000.⁴⁰ These schools are, thus, a microcosm of our constitutional system with a delicate balance between democracy and dissent.

So, it is no coincidence that one of the Court's earliest, and most enduring, declarations about shielding individual liberty from majoritarian pressures came in a case involving public school students. I am referring, of course, to the eloquent ruling in *West Virginia State Board of Education v. Barnette*⁴¹ in 1943. As you know, this case focused on the rights of Jehovah's Witness school

34. JOHN STUART MILL, ON LIBERTY 119 (Prometheus Books 1986).

35. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

36. See *id.*

37. *Id.* at 511; see *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

38. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. at 511.

39. *Court Ruling on Disability Adds Costs for Schools*, PATRIOT LEDGER, Mar. 4, 1999, at O1, available in 1999 WL 8453897.

40. Ken Leiser, *Twice a Day, It's Gridlock at Schools, Class Is Out, and Traffic Is Bumper-to-Bumper*, ST. LOUIS POST-DISPATCH, Dec. 19, 1999, at C1.

41. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

students to refuse to salute the American flag because they viewed such a salute as idolatry, infringing their religious beliefs.⁴² Yet, the Court did not confine its ruling to principles of religious freedom.⁴³ Instead, it used this case as a vehicle to expound on broader principles of freedom of conscience and, even more broadly, on fundamental individual rights in general.⁴⁴

I hope you have all read Justice Jackson's ringing phrases before, but they bear repeating and reflecting upon. In explaining the ACLU's position in the *Tinker* case, as well as in current students' rights cases—not to mention many other cases—I am constantly asked, "But what about the rights of the majority? Don't the majority of the voters have the right to decide that students shouldn't be allowed to read certain books? And why don't the majority of students have the right to decide that they want to recite a group prayer at their graduation?" Just as we continue to hear those questions, we have to continue to heed Justice Jackson's words, which eloquently answer all of them:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, to free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.⁴⁵

The general tension between government power and individual rights is dramatically illustrated, in the public school context, in the Supreme Court's almost self-contradictory statements about the two seemingly inconsistent functions of public education.⁴⁶ On the one hand, mirroring the schools' majoritarian, communitarian dimension, the Court has stressed their inculcative role.⁴⁷ For example, the Court has stressed the schools' role in "inculcating fundamental values necessary to the maintenance of a democratic political system."⁴⁸ On the other hand, to counter the schools' own repressive tendencies,

42. *Id.* at 629.

43. *See id.* at 630-42.

44. *See id.*

45. *Id.* at 638.

46. Compare *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (conveying the importance of the schools' role in socialization of societal values), with *Board of Educ. v. Pico*, 457 U.S. 853, 877 (1982) (holding that school officials may not remove books from school libraries for the purpose of restricting access to the political or social perspectives discussed therein).

47. *See Ambach v. Norwick*, 441 U.S. at 77.

48. *Id.*

the Court has stressed their responsibility to respect individual rights.⁴⁹ In educational terms, the Court has stressed that public schools must protect—and indeed promote—freedom of thought and inquiry.⁵⁰ For example, in another ACLU case involving students' free speech rights, *Board of Education v. Pico*,⁵¹ the Court said that schools should serve as a "marketplace of ideas."⁵²

In short, the Court sends mixed signals about the purpose of public education. It tells us that to educate is at once to inculcate and to liberate young minds.⁵³ This paradox is a paradigm for the most challenging constitutional conflicts between the claims of the community and those of the individual. Several years ago, an editor at Harvard University Press invited me to write not one, but two books about constitutional rights in the public schools, addressing these difficult theoretical issues. I had convinced her that the area was so complex that one book would not be enough! I have written several law review articles on particular aspects of the problem,⁵⁴ and whenever I have time to pursue serious legal scholarship again, I hope to revisit this area. So I very much look forward to the insights that will be offered by the impressive constitutional scholars who will be speaking here tomorrow.

B. An Activist Perspective

But for now, as head of the nation's oldest and largest civil liberties organization, I am going to address students' rights issues from an activist perspective. I am so proud that the ACLU always has been at the forefront of the students' rights movement, not only litigating such landmark cases as *Tinker* itself, but also struggling constantly to turn the lofty principles in such leading cases into real rights for actual students all over the country.

As Thomas Jefferson is often quoted as saying and is an ACLU motto:

49. See *Board of Educ. v. Pico*, 457 U.S. at 866.

50. *Id.*

51. *Board of Educ. v. Pico*, 457 U.S. 853 (1982).

52. *Id.* at 877.

53. See *id.* at 868-69.

54. See Nadine Strossen, *A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 HARV. J. ON LEGIS. 117 (1987); Nadine Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 (1985); Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607 (1995); Nadine Strossen, *Protecting Student Rights Promotes Educational Opportunity: A Response to Judge Wilkinson*, 1 MICH. L. & POL'Y REV. 315 (1996); Nadine Strossen, "Secular Humanism" and "Scientific Creation": *Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333 (1986).

"Eternal vigilance is the price of liberty."⁵⁵ After all, just as the Constitution itself is not self-executing, that is also true for Supreme Court decisions implementing constitutional guarantees. They are all worth only the paper they are written on unless government officials actually honor them. That is why James Madison worried the Constitution might be a mere "parchment barrier"⁵⁶ against government oppression. And that is why the ACLU was founded early in this century, along with other human rights organizations, to provide the legal services and other resources to ensure the actual enforcement of constitutional rights.⁵⁷

Here, too, the schools are a microcosm illustrating civil libertarians' constant, complementary tasks: both to establish broad new legal principles at the Supreme Court level and to enforce even the most tried-and-true principles at the local level. Along with all government officials, school officials violate even established constitutional rights for two basic reasons: either good-faith ignorance of the law, or bad-faith defiance of it.

VI. IGNORANCE OF THE LAW

I can illustrate the first problem by citing a *New York Times* article from last year. It was describing some of our many recent students' rights cases involving the Internet, in which we have successfully defended students whom schools have punished for exercising First Amendment freedoms⁵⁸ in ways that did not come close to satisfying *Tinker's* standard—namely, that schools could limit students' speech only when necessary to avoid a "substantial disruption of or material interference with" the educational process.⁵⁹

Specifically, in these Internet cases, the schools have been suspending and expelling students just for creating their own Web sites on their own home computers on their own time.⁶⁰ The student expression had nothing whatsoever to do with the schools, except it dared to express views that were critical of the school or of particular teachers.⁶¹ Shocking! Seriously, as a teacher myself, I

55. See JOHN BARTLETT, *FAMILIAR QUOTATIONS* 479b n.2 (Emily M. Beck ed., 14th ed. 1968).

56. THE FEDERALIST NO. 48 (James Madison).

57. See Nadine Strossen, *Bringing the Constitution to Life*, INTELLECTUALCAPITAL, Dec. 23, 1999 (visited Jan. 26, 2000) <<http://www.intellectualcapital.com/>>; see also Editorial, *The Expanding Reach of Civil Rights*, N.Y. TIMES, Dec. 24, 1999, at A22 (noting the contributions of the NAACP and the ACLU to the protection of civil rights and liberties).

58. See Terry McManus, *Home Web Sites Thrust Students Into Censorship Disputes*, N.Y. TIMES, Aug. 13, 1998, at G9.

59. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969).

60. See McManus, *supra* note 58.

61. *Id.*

empathize with how it must hurt to have a student's criticism posted online for all the world to see. Hurt feelings or wounded pride, however, hardly justify censoring or punishing speech, which is why the ACLU has won all of these cases.⁶²

The *Times* quoted a school superintendent in one of these cases, explaining why the school had decided to settle the case in our client's favor.⁶³ The superintendent said: "[T]here was a technicality in his favor."⁶⁴ The school district's lawyer added, "The First Amendment was overlooked!"⁶⁵ Unfortunately, for each such case that comes to our attention, there are undoubtedly countless others that do not, where students' First Amendment rights are relegated to the role of mere "technicalities" that remain "overlooked."

VII. DEFIANCE OF THE LAW

The ACLU's many students' rights cases also illustrate the other major reason why constitutional rights in general are so often honored only in the breach. This is an area where government officials too often defiantly thumb their noses at Supreme Court decisions with which they disagree. After all, the term "massive resistance"⁶⁶ was coined to describe local officials' deliberate disregard of the Court's decision in *Brown v. Board of Education*,⁶⁷ upholding the equality rights of African-American school students.⁶⁸

Likewise, to this day, all over the country teachers and administrators willfully violate the Court's many decisions striking down school-sponsored prayers and other religious activities.⁶⁹ In 1997 I debated Oklahoma Congressman Ernest Istook, who was sponsoring one of the many proposed constitutional amendments that would expressly overturn those decisions. He is

62. See, e.g., *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

63. See *McManus*, *supra* note 58.

64. *Id.*

65. *Id.*

66. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 545 (1989) (Marshall, J., dissenting) (citing *Bradley v. School Bd.*, 462 F.2d 1058, 1075 (4th Cir. 1972) (Winter, J., dissenting)).

67. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

68. *Id.* at 494-95.

69. See, e.g., *Doe v. Santa Fe Sch. Dist.*, 168 F.3d 806, 810-11 (5th Cir. 1999) (indicating that teacher "handed out fliers advertising a Baptist religious revival" and then, after a student said she was a Mormon, "launched into a diatribe" discussing the evils of Mormonism; and further stating that for a "period of time leading up to and including the 1992-93 and 1993-94 school years," the school district "allowed students to read overtly Christian prayers from the stage at graduation ceremonies and over the public address system at home football games").

doing so yet again right now, during the current Congressional term.⁷⁰ Ernie Istook candidly acknowledged that these decisions are already widely disregarded in practice. Indeed, he celebrated the school officials who were—and are—openly violating the Court's constitutional commands as heroes, praising their "civil disobedience."⁷¹

We should not be surprised by these political attacks on rulings upholding students' constitutional rights and, thereby, overturning state laws or school board policies. As I have already said, our schools are the classic battlegrounds for the most wrenching conflicts in our society between government power or community control on the one hand and individual or minority group rights on the other.⁷² So, many of our most politically and culturally explosive debates play out in the school context—and *replay*, I might add.

In the words of the ACLU's principal founder Roger Baldwin: "No fight for civil liberties ever stays won."⁷³ And that insight is especially apt in the school context. Precisely because the stakes are so high in school-related controversies, the partisans continue to battle, no matter what the Supreme Court might have ruled. Again and again, we find ourselves fighting measures that are inconsistent with seemingly well-settled precedents. For example, in the past year, we have had to counter everything from official actions discouraging the teaching of evolution⁷⁴ to government actions encouraging the posting of the Ten Commandments on classroom walls⁷⁵—even though the ACLU had won Supreme Court cases striking down both types of measures many years ago.⁷⁶

70. H.R.J. Res. 66, 106th Cong. (1999).

71. See generally John Zipperer, *School-Prayer Amendment Draws Mixed Support*, CHRISTIANITY TODAY, Jan. 9, 1995, available in 1995 WL 12151214 (discussing the argument surrounding prayer in schools).

72. See *supra* notes 33-54 and accompanying text.

73. Lindsey Gruson, *Second Thoughts on Moments of Silence in the Schools*, N.Y. TIMES, Mar. 4, 1984, at 6E.

74. See *Testimony of Eric Klein, Special Projects Coordinator, ACLU of Kansas and Western Missouri Before the Kansas Board of Education* (visited Apr. 6, 2000) <<http://www.aclu.org/library/ksevol.html>>.

75. See *Diloreto v. Downey United Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999); see also H.R. 1501, 106th Cong. (1999) (approving amendment allowing public schools to post the Ten Commandments in classrooms by a House vote of 248-180).

76. See *Edwards v. Aguillard*, 482 U.S. 578, 595-97 (1987) (striking down the Louisiana Creationism Act which forbade the teaching of evolution in elementary and secondary public schools unless accompanied by creationism on grounds that the Act violates the Establishment Clause of the First Amendment); *Stone v. Graham*, 449 U.S. 39, 42-43 (1980) (striking down a Kentucky statute requiring the posting of the Ten Commandments in public school rooms on grounds that it has no secular legislative purpose and was therefore unconstitutional); *Epperson v. Arkansas*, 393 U.S. 97, 108-09 (1968) (striking down an Arkansas statute prohibiting mention of Darwin's theory on grounds that it unconstitutionally establishes a religion). In

To drive this point home—what Yogi Berra called “déjà vu all over again”⁷⁷—let me return to the Supreme Court’s very first case expressly upholding students’ First Amendment rights, which I have already mentioned. This is the *Barnette* decision, holding that schools could not force students to salute the American flag contrary to their conscientious beliefs.⁷⁸ Yet now, more than half a century after that landmark ruling, we are still forced to come to the defense of students who seek to exercise this fundamental freedom of conscience. In 1998, for example, I had the honor of presenting a prestigious national “Individual Conscience” award to one such student, a young woman named Tisha Byars from Waterbury, Connecticut, another worthy heir of Mary Beth Tinker and her co-plaintiffs. The importance of Tisha’s case is indicated by the fact that it was included in Nat Hentoff’s inspiring book, *Living the Bill of Rights: How to Be an Authentic American*.⁷⁹ Nat first explained the *Barnette* decision and the many later court decisions that have consistently enforced it in many different factual contexts.⁸⁰ For example, they have ruled that students who choose to remain seated during the Pledge cannot be removed from the room.⁸¹ In short, we are talking about very clear, very settled legal principles. Still, that does not necessarily mean they are respected by the other kind of principals, the kind that are supposed to be your “pals”! Not even in Connecticut, which as Nat wrote—showing a touch of regionalism—is “a state not known to be backward in these matters.”⁸²

Even in this reputedly enlightened part of the country, school officials were penalizing Tisha Byars for not participating in the Pledge, because, as a young African-American woman, she did not believe there is “liberty and justice” for African-Americans in this country.⁸³ In addition to being sent to the principal’s office, where she was harassed by school employees, Tisha was also denied admission to the National Honor Society although she was eminently qualified.⁸⁴ Suffering from humiliation and the loss of scholarship opportunities,

Edwards and Stone, the ACLU directly represented the parties pressing the Establishment Clause claims; in *Epperson*, the ACLU filed an amicus brief in support of the Establishment Clause claim.

77. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 755 (Justin Kaplan ed., 16th ed. 1992) (attributing the quote to Yogi Berra).

78. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

79. NAT HENTOFF, *LIVING THE BILL OF RIGHTS: HOW TO BE AN AUTHENTIC AMERICAN* 144-45 (1998).

80. *Id.* at 143.

81. *Id.*

82. *Id.* at 144.

83. *National Honor Society Must Admit Student Who Rejects Pledge*, *HARTFORD COURANT*, May 28, 1999, at A3, available in 1997 WL 10965978 [hereinafter *National Honor Society*].

84. *Id.*

Tisha ultimately was forced to transfer schools.⁸⁵

While her school officials concocted some supposed justification for denying Tisha admission to the National Honor Society, the federal judge in her lawsuit, Peter Dorsey, found that excuse to lack all credibility.⁸⁶ In fact, during the trial, Judge Dorsey could not help showing his outrage at the outrageous conduct of the school officials—whom Nat Hentoff described as “alleged educators.”⁸⁷ In the same vein, Judge Dorsey issued a strongly-worded preliminary injunction, criticizing school officials for their mistreatment of Tisha and ordering them to admit her to the National Honor Society retroactively.⁸⁸

VIII. HOW TO NOT WIN FRIENDS BUT INFLUENCE PEOPLE

These kinds of legal victories come at a high price, though. To win a constitutional challenge against a local school, generally, is not to win any popularity contests—to the contrary, as Mary Beth Tinker learned at such a young age. Here is Nat Hentoff's account of some of the harassment and vilification that Tisha and her family endured:

Predictably, this . . . lawsuit . . . [was] condemned by some war veterans and others to whom the flag is more sacred than someone's freedom of conscience. One angry protester couldn't resist a touch of bigotry, urging that the Byars family move to Africa. When Tisha's picture appeared on the front page of a local newspaper, several business owners threatened to remove their ads. Joe McCarthy is not quite dead.⁸⁹

Terrible as Tisha Byars's experience was, it was all-too-typical. Students are disciplined and derided just for insisting that schools honor their obligations under *Barnette*. One of our most recent cases of this type was in San Diego.⁹⁰ It unleashed furious attacks against our young female client, and also against the ACLU, from all over the country.⁹¹ For example, one editorial cartoon showed two vultures labeled “ACLU” sitting on a bare tree branch; one is peering at the

85. *Id.*

86. *Id.*; HENTOFF, *supra* note 79, at 145.

87. HENTOFF, *supra* note 79, at 144.

88. *National Honor Society*, *supra* note 83.

89. HENTOFF, *supra* note 79, at 144.

90. *ACLU Sues CA School District for Forcing Student to Stand During Pledge of Allegiance* (visited Feb. 24, 2000) <<http://www.aclu.org/news/n052298a.html>> (stating the ACLU of San Diego filed suit on behalf of Mary Kait Durkee, who was forced to stand while her 10th grade class recited the Pledge of Allegiance).

91. See, e.g., Linda Hills, *The Flag Stands for the Right Not to Salute*, SAN DIEGO UNION-TRIB., June 9, 1998, at B7 (discussing the anger many people felt toward Mary Kait Durkee and the ACLU).

ground through a pair of binoculars; the other asks, "See anymore school districts we can rip off for a quick buck?"⁹² Of course, the only reason we are forced to sue in any of these cases is that school officials too often refuse to resolve them voluntarily, through negotiation, despite the clear legal precedents.

I could regale you with countless particular examples. The stories are both infuriating and inspiring—infuriating because of the constant violation of the most fundamental, long-settled student rights, yet inspiring because of the courage of individual students, parents, and teachers in daring to stand up to community criticism, hostility, and often even worse, in order to enforce rights not only for themselves, but also, ultimately, for all of us.

From what I have said so far, you can see what a serious dual challenge is posed by the topic of this symposium—students' rights. Not only does this area pose some perplexing problems in terms of competing constitutional and political theory principles, but also, even in those aspects of this area where the principles have been settled, there are still perpetual political and practical problems in ensuring that the principles are actually understood and observed.

IX. INCREASING ENFORCEMENT CHALLENGES IN THE POST-COLUMBINE BACKLASH

For the remainder of my remarks, I am going to focus on these enforcement challenges, drawing on the ACLU's extensive experience. Busy as we always have been on the students' rights front, we became far busier beginning with the spring of 1999, in the wake of the tragic school shootings in Colorado and Georgia. In the immediate aftermath of those shootings, all over the country schools cracked down on students' rights in an understandable, but ultimately misguided, effort to avert such a disaster themselves.

Moreover, since the fall of 1999, as schools reopened for the first post-Littleton school year, we have been seeing even more measures that are turning schools into fortresses and students into prisoners. All across the country, ACLU offices have been receiving complaints from students and parents in record-setting numbers. The principles and rights that the Supreme Court extolled in the *Tinker* case are more embattled than ever. Students have been suspended, expelled, and in some cases, even hauled off to jail for engaging in a whole range of expression that should surely be protected under *Tinker* but instead are denounced as "dangerous."⁹³ In some cases, not just school officials,

92. Mark Thornhill, *Thornhill's View*, N. COUNTY TIMES (Escondido) July 23, 1998, at A1.

93. See generally *Isaacs ex rel. Isaacs v. Board of Educ.*, 40 F. Supp. 2d 335, 337-38 (D. Md. 1999) (finding a "no-hats" policy constitutional because wearing of a headwrap was not a

but also courts, are suppressing this expression.⁹⁴ Let me cite one recent example. A seventeen-year-old boy in Wilmington, North Carolina was expelled for a year, held in jail for three days and nights, and criminally convicted of communicating threats, because he typed the following words on a computer screen at his high school: "The end is near."⁹⁵ He said he meant this as a joke, referring to the then-impending millennium, which to some people did signal the end of the world.⁹⁶ But neither the judge nor the jury shared this young man's sense of humor.⁹⁷ They decided he should suffer a stiff criminal punishment in addition to being thrown out of school.⁹⁸ This teenager did not even intend to threaten anyone's life, let alone actually do so.⁹⁹ But still, this incident has in fact jeopardized a young person's life: his own. In his mother's anguished words, upon hearing the jury verdict, "They've taken away a child's life."¹⁰⁰

In the post-Littleton panic, we have had to defend students for engaging in such other allegedly "threatening" conduct as the following: dying their hair blue;¹⁰¹ wearing black trenchcoats or other black garments;¹⁰² having body piercings or tattoos;¹⁰³ wearing that notorious "gang symbol," the Star of David;¹⁰⁴ and wearing T-shirts bearing the name of that other notorious gang, the "Vegans."¹⁰⁵

political expression and the rule furthered the interest in lessening "horseplay and conflict in the hallways"); *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1223, 1232-33 (D. Kan. 1998) (finding constitutional a ban on clothing depicting the confederate flag because the school board had reasonable basis to believe such clothing would cause violence).

94. See *Isaacs ex rel. Isaacs v. Board of Educ.*, 40 F. Supp. 2d at 337-38; *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d at 1232-33.

95. Cory Reiss, *Computer Message at Hoggard; Jury Convicts Student of Threatening School*, MORNING STAR, Sept. 30, 1999, at 1B.

96. *Id.*

97. *Id.*

98. *Id.*

99. See *id.*

100. *Id.*

101. See Arthur William Ritter, *As in Surrey, There's Blue Fringe on the Top*, RICHMOND TIMES DISPATCH, June 7, 1999, at A10; *Federal Court Reinstates High School Student Suspended for Blue Hair* (visited Feb. 23, 2000) <<http://www.aclu.org/news/1999/n060499a.html>>.

102. See Tammerlin Drummond, *Battling the Columbine Copycats*, TIME, May 10, 1999, at 29; News Conference of Ann Beeson of the ACLU (Aug. 13, 1999) (transcript on file with the Federal Document Clearing House) [hereinafter News Conference].

103. See Melissa Healy, *New Laws Ignite Fight on Rights of Children*, BUFF. NEWS, July 4, 1999, at A1; Melissa Healy, *Zeal to Rein in Teen Grows, as Does Backlash*, L.A. TIMES, July 3, 1999, at A1.

104. *Jewish Student Allowed to Wear Star of David Pendant as Mississippi School Board Reverses Policy*, *supra* note 3.

105. *ACLU Year in Civil Liberties 1999* (visited Mar. 26, 2000) <<http://www.aclu.org/library/ycl99/education.html>>.

A school in Harrisburg, Pennsylvania strip-searched a fourteen-year-old girl for saying she understood how kids might snap if they were teased endlessly.¹⁰⁶ A twelve-year-old boy in Ponchatoula, Louisiana was locked up in juvenile detention for two weeks for making "terroristic threats" when he told ninth graders in the cafeteria line he would "get them" if they did not leave enough potatoes for him.¹⁰⁷ A thirteen-year-old Albuquerque student was suspended when, on a field trip to the Atomic Museum, he asked, "When we get there, are they going to teach us how to build a bomb?"¹⁰⁸ And a nine-year-old Ohio boy, who wrote a fortune cookie message for a class project on Asian culture, was suspended because the message said, "You will die an honorable death."¹⁰⁹

In light of our fortune cookie case, I cannot help commenting on one of the reasons why I am so happy that Professor Thomas Baker invited me to this conference. And you may remember, Tom, I mentioned this way back when you first invited me, more than a year ago. During my first visit to your Constitutional Law Center, one of the fine meals to which you treated me was at Cafe Su. I have always loved fortune cookies, but I had never tasted any approaching Cafe Su's unique "signature cookies,"—namely chocolate-dipped fortune cookies! I made a point of stopping by the cafe before coming over here, and I will not confess exactly how many dozens of these delicacies I bought. It was, of course, a public safety mission—to ferret out any terroristic threats they might contain!

If the *Tinker* case were still good law, in spirit as well as in letter, not only the fortune cookie case, but also all of the others I have described—not to mention the many, many others I have not taken time to describe—should be clear-cut easy winners. Sad to say, though, we have been losing some of them, including, shockingly, the "Vegan" T-shirt case. A federal judge in Salt Lake City upheld the student's suspension for wearing the shirt, expressly invoking the Littleton tragedy in his opinion.¹¹⁰ Although the suspension occurred before the Littleton shootings, the judge's ruling was issued shortly thereafter, in the ensuing crisis atmosphere.

Of all these sad cases, to me the saddest was one we recently handled in Allen, Texas, where a young woman was suspended for—of all things—wearing

106. News Conference, *supra* note 102.

107. *Id.*

108. *Id.*

109. *Id.*; *Third-Grader Suspended over Fortune Cookie Message* (visited Feb. 23, 2000) <<http://www.aclu.org/news/1999/n061499d.html>>.

110. See *ACLU Victorious in Texas Black Arm Band Case* (visited Feb. 24, 2000) <<http://www.aclu.org/news/1999/n083099c.html>>.

a black armband.¹¹¹ Following directly in the footsteps of Mary Beth Tinker, our client in this case, Jennifer Boccia, was one of ten students at her high school who decided to wear black armbands in the aftermath of the Littleton shootings, both to honor the slain students at Columbine High and to protest the repressive policies that their own school had implemented as an alleged response.¹¹² Specifically, their school instituted strict speech codes, dress codes, and random searches.¹¹³ So, the school compounded one rights violation with another: first it suspended the freedoms of all students, and then it suspended the individual students who peacefully protested these wholesale violations.¹¹⁴

As Mary Beth Tinker said so presciently in the 1995 speech I quoted earlier, "Lately you can't use *Tinker* to do much of anything."¹¹⁵ Indeed. If you cannot even trust schools to protect the very same expression that was involved in *Tinker* itself, you must wonder if it has been not only undermined but also, in effect, overruled. In this case, though, after the ACLU was forced to sue on Jennifer's behalf, the school finally saw the light and entered into a settlement vindicating both Jennifer's rights, and those of other students.¹¹⁶

I write a monthly column for a Webzine, *IntellectualCapital*, and the recent assault on students' rights has been so overwhelming that it has been the topic of two columns in the fall of 1999.¹¹⁷ I titled one of these, "My So-Called Rights," after the mid-90s television drama depicting teenage life with refreshing realism, "My So-Called Life." In fact, my column invokes media depictions—and distortions—of young people and youth violence as a theme.

X. THE ROLE OF THE MEDIA: SCAPEGOAT OR CO-CONSPIRATOR?

There are many complex, and even contradictory, intersections between the media and the problems presented by this symposium. Our symposium topic implicates a number of over-arching themes. For tonight's talk, I have time only to touch on one of these, and I have chosen the role of the media. To introduce this topic, let me quote the opening lines in my September, 1999 column:

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. *Tinker*, *supra* note 10, at 6.

116. *See ACLU Victorious in Texas Black Arm Band Case*, *supra* note 99.

117. *See* Nadine Strossen, *My So-Called Rights*, *INTELLECTUALCAPITAL* (Sept. 30, 1999) <<http://www.intellectualcapital.com/issues/issue306/item6640.asp>>; Nadine Strossen, *Amen to Religious Liberty*, *INTELLECTUALCAPITAL* (Sept. 2, 1999) <<http://www.intellectualcapital.com/issues/issue286/item6266.asp>>.

For all the glossy teen dramas debuting on television this fall, the one program that most closely approximates reality for many high school students today is HBO's gritty prison drama, "Oz."

What with random searches—including strip searches and urinalysis drug testing—zero tolerance, snitch lines, seizure of private papers, drug-sniffing dogs, surveillance cameras, metal detectors, mandatory uniforms, and armed on-site police officers, the schoolhouse these days is looking more and more like the jailhouse.¹¹⁸

The media's sensationalized coverage of school violence has helped to whip up exaggerated fears, which in turn spur school officials and politicians to overreact, treating all students like potential perpetrators or victims of mass murder. Of course, the physical assaults and killings that occurred in Columbine and elsewhere have been terrible tragedies, but they are not, fortunately, part of a nationwide trend. To the contrary.

There are many recent studies of youth violence, in schools and elsewhere, and they all show encouraging downward trends. Contrary to the media hype, schools are in fact about the safest kids can be—safer than the streets and, sad to say, safer than their homes. I will cite just one example of the many studies that confirm these conclusions, whose name says it all. It is a recent report by the Justice Policy Institute, titled: *School House Hype: School Shootings and the Real Risks Kids Face in America*.¹¹⁹ This report documents that, between 1992 and 1995, there were an average of forty-two violent deaths per year in schools.¹²⁰ In contrast, between 1995 and 1998, that number dropped to thirty-three.¹²¹ This study also showed that a minor is three times more likely to be killed by an adult than by another juvenile.¹²² It further showed, sad to say, that at least 2000 children per year are killed by violence in their own homes by their own parents or guardians. That is the equivalent of one Columbine every three days.¹²³

XI. MEDIA HYPE

Far from addressing the real problems of youth violence, though, public policy has been focusing on schools, no doubt driven at least in part by media

118. *Id.*

119. Elizabeth Donohue et al., *School House Hype: School Shootings and the Real Risk Kids Face in America*, JUST. POL'Y INST. (1998) (visited Mar. 26, 2000) <<http://www.cjcj.org/jpi/schoolhouse.html>>.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

hype. According to one media watchdog organization, the Center for Media and Public Affairs, "shootings at eight . . . public schools around the country generated . . . more than 10 hours of [broadcast] airtime within the first seven days of each incident, in addition to uncounted hours of live coverage and extensive follow-up discussions on the 24-hour cable news channels."¹²⁴ While these tragic shootings were certainly major news stories, the unduly protracted and hysterical coverage created a misperception that these incidents were part of a trend or epidemic.

In addition to generating unfounded fears that "it could happen anywhere," the sensationalized coverage tended to propel panic about all teenagers as potential terrorists—or at least all of those who wear black or favor Goth-themed Web sites, or are otherwise "different." In this vein, more schools are moving toward "profiling" their students,¹²⁵ in yet another chilling parallel to a tactic that comes from the criminal justice field and has been justly condemned as discriminatory and ineffective even in that context.¹²⁶

As I and other ACLU spokespeople have constantly been reminding school officials and journalists: "Different does not mean dangerous." Conversely, though, stifling difference among our nation's youth and students *is* dangerous—dangerous not only to their freedom and dignity, but also to their education and to their potential contribution to their communities. These basic points were stressed by the *Tinker* decision. First, the Court barred schools from disciplining students just because they are different, and therefore spur undifferentiated fears.¹²⁷ It said:

[I]n our system, undifferentiated fear . . . of disturbance is not enough to overcome the right of free expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this

124. S. Robert Lichter & Dawn Holian, *Lights! Camera! School Violence!*, NEWSWATCH (last modified Aug. 27, 1999) <<http://www.newswatch.org/spotlight/990827f1.html>>.

125. See Troy Anderson, *Student Profiling Unveiled, Criticized; Program Could Warn of Violence-Prone*, L.A. DAILY NEWS, Dec. 15, 1999, at N1; *Anticipating Violence: Are "Profiles" of Students the Answer?*, DALLAS MORNING NEWS, Nov. 30, 1999, at 18A; Mary Lord, *The Violent-Kid Profile: A Controversial New Technique for Beating Violence*, U.S. NEWS & WORLD REP., Oct. 11, 1999, at 56; Gretchen McKay, *Can "Profiling" Prevent School Violence? Its Critics Fear That Some Kids Would Be Branded Unfairly*, PITT. POST-GAZETTE, Oct. 27, 1999, at A1; *Profiling the Next School Shooters*, NEWSWEEK, Sept. 27, 1999, at 4.

126. See, e.g., Strossen, *supra* note 117 (discussing students' rights and the schools' curtailment of those rights).

127. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 508-09 (1969).

sort of hazardous freedom—this kind of openness—that is the basis of our national strength.¹²⁸

Second, the *Tinker* Court stressed the educationally negative impact of stifling students who dare to be different.¹²⁹ It quoted the following key passage to that effect from that earlier leading students' rights ruling, *Barnette*: "That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms . . . if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."¹³⁰

While too much post-Littleton media coverage continues to hype such terrible incidents and to hide the overall positive trends, there has been one notable exception. At a recent meeting of the National Conference of Editorial Writers, several journalists took their profession to task for "repeating misleading information about youth violence."¹³¹ The group warned that, for the price of a byline or a piece on the evening news, reporters "may be eroding public trust in teenagers while nurturing policy changes that do more harm than good."¹³²

This point was echoed by Barry Glassner, a sociology professor at the University of Southern California, who wrote a book with the apt title—and topic—*The Culture of Fear: Why Americans Are Afraid of the Wrong Things*.¹³³ He wrote a recent column in which he cited media-induced fear of teenagers and youth violence, bearing no relationship to the actual crime statistics.¹³⁴ This unfounded fear in turn fuels unjustified political actions. For example, Florida Representative Bill McCollum has denounced violent youths as "feral, presocial beings" and denounced violent juvenile crime as "a national epidemic."¹³⁵ But, as Glassner comments:

Not only does the hoopla inspire copycat crimes . . . , but it also diverts attention and money away from the biggest risks to young people . . .

128. *Id.* (citations omitted).

129. *See id.* at 511-13.

130. *Id.* at 507 (quoting *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

131. Mark Obmascik, *Media Hurting Image of Teens, Editors Say*, DENVER POST, Sept. 19, 1999, at B1.

132. *Id.*

133. BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* 72-73 (1999).

134. Barry Glassner, *It's Hard to Tell, but Teen Violence Is on the Decline*, PALM BEACH POST, Aug. 14, 1999, at 13A.

135. *Id.*

With 20 percent of American children living in poverty and thousands dying each year in [car] accidents that could be prevented, our preoccupation with teen killers does our country a profound disservice.¹³⁶

The associate editor of the *Portland Oregonian*, David Sarasohn, echoed: "Americans now have a hugely distorted view of kids We have to think less [of] what we see about kids on CNN and more [of] what we see about kids ourselves."¹³⁷

In the ACLU's offices all around the country, we continue to see kids who are carrying on in the finest tradition of the *Tinker* plaintiffs, aware of their rights and asserting them, even at great personal cost.¹³⁸ We are also seeing students organizing to educate other young people about their rights and to assist them in exercising these rights. All over the United States, there has been a steady groundswell of student activism and organizing, including student ACLU clubs sprouting up at high schools, colleges, and law schools, and a new high school students' organization that was formed last year, which works in close collaboration with the ACLU, but maintains its autonomy and student-controlled status.¹³⁹ It is called the International Student Activism Alliance, or ISAA.¹⁴⁰

In short, actual students in the real world hardly match the caricatures too often conveyed by the media. Likewise, the overwhelming majority of actual schools will never witness anything approaching the murder and mayhem at a few schools to which the media give disproportionate coverage. The chance that any particular school will be the scene of a shooting is one in 33,000.¹⁴¹ In 1998, three times as many people were killed by lightning as were killed by school violence.¹⁴²

XII. CENSORING, VERSUS CENSURING, THE MEDIA

So, on the one hand, I and others blame the media for contributing to the massive, systemic, nationwide attack on students' rights in the wake of the few,

136. *Id.*

137. Obmascik, *supra* note 131.

138. See Tod Olson, *The Teen Crack*, TEEN PEOPLE, Feb. 2000, at 70, 70-77.

139. See Liza Featherstone, *Hot-Wiring High School: Student Activists Across the Country Experiment with Organizing by Internet*, NATION, June 21, 1999, at 15; Olson, *supra* note 138, at 72.

140. *See id.*

141. Steve Chapman, *The Naked Truth About Keeping Kids Safe at School*, CHI. TRIB., Sept. 2, 1999, at 31.

142. *Today Show* (NBC television broadcast, Aug. 17, 1999) (transcript on file with the *Drake Law Review*) (discussing the book, *The Culture of Fear: Why Americans Are Afraid of the Wrongs Things* with the author, Barry Glassner).

isolated attacks on students' lives. On the other hand, other critics are blaming the media for contributing to those school killings. Thus, in the post-Littleton backlash, Congress considered censoring TV violence as a supposed response to actual youth violence.¹⁴³ Wrongful death lawsuits have been brought on behalf of the parents of students who were killed in the Paducah, Kentucky school shootings against the producers and distributors of various media depictions of violence, including the acclaimed movie, *The Basketball Diaries*.¹⁴⁴

I obviously believe in the right—and, I might add, the responsibility—to criticize or censure the media. I have been exercising that right myself, just now, by criticizing distorted media coverage of school safety issues. But I strongly oppose any attempt to censor the media—whether directly, as through the proposed Congressional legislation, or indirectly, through these lawsuits, which seek hundreds of millions of dollars in damages.

As is always the case with censorship, in this instance too, it is doubly flawed. First, of course, it suppresses expression, including expression that has much value for young people and adults alike. In addition to stifling valuable expression, scapegoating media violence is a dangerous diversion from addressing the actual causes of violence against youth in schools and elsewhere. Furthermore, it is an even greater diversion from the larger challenges our schools face—most fundamentally, ensuring adequate and equal educational opportunities for all students, regardless of their income or their racial or ethnic background.

The foregoing critique of image-blaming points to the pervasive problem with the whole raft of post-Littleton assaults on students' rights: not only are they destructive in terms of students' rights; they also are not constructive in terms of students' safety, let alone in terms of students' educational experiences. At best, these over-reactive punitive measures are ineffective in countering potential violence; at worst, they are downright counter-productive. These points have been made not only by civil libertarians, but also by educational and school safety experts—including officials of the National Alliance for Safe Schools, the National Association of School Administrators, and the National Association of School Psychologists.¹⁴⁵ Students who are determined to commit

143. See Adam Cohen, *Bullets over Hollywood*, TIME, June 28, 1999, at 64; Clarence Page, *Congress' Solutions to Curb Youth Violence Are Riddled with Problems*, CHI. TRIB., June 23, 1999, at N19; Frank Rich, *Washington's Post-Littleton Looney Tunes*, N.Y. TIMES, June 19, 1999, at A15.

144. See Frank Galati, *Driving up the Cost of Violence*, TORONTO STAR, June 6, 1999, at E1; Guy Kelly, *Lawsuits Damage Grieving Community*, DENV. ROCKY MTN. NEWS, June 15, 1999, at 4A.

145. See *The Edge with Paula Zahn: Profiling Children* (Fox News Network broadcast, Sept. 23, 1999) (transcript on file with the *Drake Law Review*).

violence can always find ways to do so, no matter what measures the schools implement. For example, the killers in Jonesboro, Arkansas fired from outside the school, and the Columbine High School massacre was not deterred by that school's armed security guards.

Moreover, martial-law-type measures that we are seeing in too many schools tend to fan students' fears, far from calming them, thus making students feel not more secure, but less so. Indeed, studies show that, while students' actual safety is increasing, their sense of safety is decreasing¹⁴⁶—again, hardly conducive to a constructive educational experience.

In short, this is yet another context in which the schools illustrate an overarching theme of civil liberties and constitutional law: that we need not trade off freedom against safety or security—these two concerns can often be mutually reinforcing, rather than antagonistic. In that vein, I am fond of paraphrasing a line that has been attributed to both Thomas Jefferson and Benjamin Franklin: “Any society that would give up a little liberty to gain a little security will deserve neither and lose both.”¹⁴⁷

When schools were opening around the country in the fall of 1999, and the ACLU offices around the country were reeling from the rash of compelling students' rights complaints, I read one newspaper account that was particularly alarming, which I would like to share with you. It was written by Stephen Chapman, a syndicated columnist for the *Chicago Tribune*.¹⁴⁸ His byline was “Averageburg, U.S.A.”¹⁴⁹ The story began as follows:

Norman Rockwell High School today became the first school in the country to address problems of discipline and safety by mandating a no-clothing policy for all students. “We tried school uniforms to eliminate inappropriate clothing and gang attire, and we banned backpacks to prevent kids from sneaking in weapons, but those were really halfway solutions,” said principal Justin Case “We realize some kids think this is a violation of their privacy,” he acknowledged, “but these days, we feel, you just can't be too careful. And if past experience is any indicator, they'll get used to it pretty quickly.”¹⁵⁰

146. See Citizens for Juvenile Justice, *Strengthening Massachusetts Juvenile Justice Dialogue, Education and Advocacy* (visited Jan. 25, 2000) <<http://www.cfjj.org/school.html>>.

147. See generally THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS 141 (Anthony Jay ed., 1996) (detailing that Benjamin Franklin stated: “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety” in 1759).

148. Stephen Chapman, *New School Safety Rules Are an Overreaction to a Very Small Problem*, GAZETTE, Sept. 5, 1999, at 5, available in 1999 WL 22531025.

149. *Id.*

150. *Id.*

I must admit, when I first read this, I had been hearing so many shocking reports about what was going on in high schools around the country that it took me a moment to realize that it was a satire. That was, of course, Steve Chapman's very point. As he wrote: "No, the new school safety craze probably won't go as far as outlawing clothing. But it's hard to see any stopping point short of there. . . . High school kids . . . are getting pretty short on liberties, except the right to remain silent."¹⁵¹

The edition of the *Des Moines Register* that was published on the day of this symposium contained a column about the symposium topic that quoted a student at Roosevelt High School—plaintiff John Eckhardt's alma mater—making a point that was poignantly parallel to Steve Chapman's.¹⁵² The student, Erika Baty, was Roosevelt's Student Council president.¹⁵³ According to the columnist, Rekha Basu, Ms. Baty "echoed the feelings of many students" in complaining about the many security measures their school had already implemented, including banning backpacks and bringing in police officers.¹⁵⁴ To underscore her concern, Ms. Baty asked, "[W]hat else are they going to do? Are they going to make everybody wear Spandex?"¹⁵⁵

XIII. CONCLUSION

I am about to wrap this up, and I can't possibly end on such a negative note. To paraphrase Woody Allen, I really want to end with something positive, but I can't think of anything positive to say. Would you settle for two negatives?¹⁵⁶

I really do have something positive to say. However embattled the *Tinker* holding may be, its spirit and legacy are secure and enduring. Just as Mary Beth Tinker and her co-plaintiffs dared to speak out and stand up, and overcame great odds in the courts, so other students are continuing to do so today, as I have already explained. I am proud that the ACLU is continuing to assist these brave young Americans, but we could never fight against injustices in the schools unless these young people brought them to our attention. In other words, they must exercise their precious right, inscribed on my favorite ACLU T-shirt: the right *not* to remain silent.

151. *Id.*

152. Basu Rekha, *Students' Struggle for Free Speech Continues in D.M. Schools*, DES MOINES REG., Oct. 8, 1999, at 1A.

153. *Id.*

154. *Id.*

155. *Id.*

156. See Anne E. Casky, *Allen Collection Disappoints*, S. BEND TRIB., Jan. 2, 1994, at E9.